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COMMENTS

WORKMEN'S COMPENSATION—THE CARRIER'S RESERVED RIGHT OF INSPECTION AND THE INJURED EMPLOYEE

A common practice among workmen's compensation carriers is to reserve the right to make safety inspections at the place of business of the insured employer.¹ This reservation is a mere gratuitous service provided by the insurer as a means of evaluating the risks covered by the workmen's compensation policy in order to regulate the insured's premiums, but it does not preclude the insured from conducting his own program of safety control. As such, the carrier has a right, arising out of his insurance contract with the employer, but no duty to inspect.² Nevertheless, insurers have incurred liability on gratuitous safety inspections when performed negligently.³ However, it was not until 1960 that an injured employee, eligible for statutory compensation award, brought any type of action against her employer's workmen's compensation carrier as a third party tortfeasor.⁴ The gravamen of this novel case was the insurer's failure to make gratuitous inspections with due care.⁵ Since then, other actions based on the same theory have been brought against workmen's compensation carriers, and the law in this area is beginning to develop.

It is the purpose of this comment to discuss the development and analyze the arguments favoring and opposing the liability of a workmen's compensation carrier to an injured employee. The ramifications of such liability can only be understood through a discussion of the liability for a gratuitous undertaking by any insurer, whether or not a workmen's compensation carrier. Essential to this discussion is the distinction between nonfeasance and misfeasance of a gratuitous undertaking. After these general concepts have been considered, the problems involved in allowing an action against a workmen's compensation carrier as a third party tortfeasor can be approached.

¹ See 2 LARSON, *WORKMEN'S COMPENSATION*, app. E, p. 570 (1961); ABA Comm. on Workmen's Compensation & Employers' Liability Insurance Law, *Standard Workmen's Compensation and Employers' Liability Insurance Policy* 37-38 (rev. ed. 1949). See also *Vidulich v. Greater N.Y. Mut. Ins. Co.*, 80 N.J. Super. 15, 192 A.2d 596 (Super. Ct. 1963).

² Brief for Appellee, p. 22, *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

³ *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, 201 Fed. 617 (7th Cir. 1912); *Van Winkle v. American Steam-Boiler Ins. Co.*, 52 N.J.L. 240, 19 Atl. 472 (1890); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wash. 2d 423, 100 P.2d 1024 (1940).

⁴ 26 NACCA L. J. 223, 225 (1960).

⁵ *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960).

LIABILITY FOR A GRATUITOUS UNDERTAKING

The doctrine that a person who negligently performs a gratuitous undertaking can incur liability was announced as early as 1703 in *Coggs v. Bernard*.⁶ This doctrine has been adhered to by American courts ever since,⁷ and, as mentioned, has found application against insurers, other than workmen's compensation carriers. In *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*,⁸ the defendant was held liable when the plaintiff's boilers, which had been gratuitously and negligently inspected by the defendant, exploded. The court stated that, "inspection of the boilers . . . requires care and skill in its performance [and though done gratuitously, once] undertaken by the [defendant] the duty arises [to] exercise reasonable care and skill in each inspection. . . ."⁹ Liability was also incurred in *Sheridan v. Aetna Cas. & Sur. Co.*,¹⁰ where the defendant was found guilty of negligence when an elevator which it had insured injured a tenant after the defendant had made several voluntary inspections.¹¹ On the other hand, insurers which had reserved the right of inspection avoided liability in *Ulwelling v. Crown Coach Corp.*,¹² *Zamecki v. Hartford Acc. & Indem. Co.*,¹³ and *Vidulich v. Greater N.Y. Mut. Ins. Co.*¹⁴

In *Nelson v. Union Wire Rope Corp.*,¹⁵ the Illinois Supreme Court distinguished the three last mentioned cases from those holding the insurer liable.¹⁶ The court noted that in the latter group the insurers had made positive, regular, and periodic gratuitous inspections, whereas in the former the insurers had undertaken no such course of conduct, with the exception of the *Zamecki* case¹⁷ which was dismissed as being "a distinct

⁶ 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).

⁷ See *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

⁸ *Supra* note 3.

⁹ *Id.* at 629. Again in *Van Winkle v. American Steam-Boiler Ins. Co.*, *supra* note 3, an insurer incurred liability when a boiler which it gratuitously and negligently inspected exploded.

¹⁰ *Supra* note 3.

¹¹ *Accord*, *Bollin v. Elevator Constr. & Repair Co.*, 361 Pa. 7, 63 A.2d 19 (1949).

¹² 206 Cal. App. 2d 96, 23 Cal. Rptr. 631 (Dist. Ct. App. 1962).

¹³ 202 Md. 54, 95 A.2d 302 (1953). See also *Donohue v. Maryland Cas. Co.*, 248 F. Supp. 558 (D. Md. 1965), wherein the court stated that "the *Zamecki* case has not been cited by the Maryland Court of Appeals in the twelve years which have elapsed since it was announced. [T]he case proceeds on a unique set of facts, . . . was decided on demurrer, [and] decides only that a connection between plaintiff and the insurer must be alleged. . . ." (*Id.* at 592).

¹⁴ *Supra* note 1.

¹⁶ Cases cited notes 3, 5, and 11 *supra*.

¹⁵ 31 Ill. 2d 69, 199 N.E.2d 769 (1964).

¹⁷ *Supra* note 13.

minority view, [holding] that no duty could arise from voluntary inspection. . . ."¹⁸ The reservation of the right to inspect standing alone cannot lead to liability on the part of the insurer even if a careful inspection could have prevented the harm inuring to the plaintiff. Before liability can result, a duty to inspect with due care must arise by the insurer evidencing that he has undertaken to make gratuitous inspections, or it must be proven that the plaintiff or a third party relied on the insurer to make gratuitous inspections to the detriment of the plaintiff. One inspection in a three month period as in the *Viducich* case,¹⁹ and inspections conducted on a sampling basis which did not include the instrumentality harming the plaintiff as in the *Ulwelling* case,²⁰ are not demonstrative of an undertaking or reliance. If there is no undertaking or reliance there can be no duty to act carefully; thus, there can be no liability.

THE NONFEASANCE—MISFEASANCE DISTINCTION

The difficulty of determining whether an insurer by reservation of the right of inspection and subsequent conduct is under a duty to inspect with due care initially turns on whether his course of conduct can be categorized as nonfeasance or misfeasance. Traditionally nonfeasance has been defined as passive inaction not actionable unless relied upon, whereas misfeasance has been considered active misconduct working positive injury to others and actionable regardless of reliance.²¹ However, whether various types of conduct, in kind and in quantity, amount to nonfeasance or misfeasance is a question too vast to be considered here. Suffice it to say, the distinction between nonfeasance and misfeasance is founded on the individualistic philosophy of early common law, holding that a mere volunteer, not presently under a duty to render aid, would not be forced to become a benefactor.²² Although the distinction has been criticized,²³ it continues in effect²⁴ and has been embodied in the *Restatement of Torts*.

¹⁸ *Supra* note 15, at 79, 199 N.E.2d at 776.

¹⁹ *Supra* note 1.

²⁰ *Supra* note 12.

²¹ See generally, PROSSER, TORTS § 54 (3d ed. 1964).

²² *Ibid.* See also Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908).

²³ For a vigorous denunciation of the nonfeasance-misfeasance distinction, see 31 J. AM. TRIAL LAW. A. 299 (1965). "This distinction continues to plague the courts and has been perpetuated by reasoning which is lame, limp and lackluster." (*Id.* at 302). See Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951).

²⁴ *Ellsworth Brothers, Inc. v. Crook*, 406 P.2d 520 (Wyo. 1965) wherein the court cited with approval PROSSER, *op. cit. supra* note 21, and quoted therefrom as follows: "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the

Section 325 of the *Restatement*, which applies to nonfeasance, states:

One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking, (a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons, or (b) to enter upon a course of conduct which is dangerous unless the undertaking is carried out, is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking.²⁵

Section 323 (1) is applicable to misfeasance, and provides:

(1) One who gratuitously renders services to another, otherwise than by taking charge of him when helpless is subject to liability for bodily harm caused to the other by his failure, while so doing, to exercise with reasonable care such competence and skill as he possesses or leads the other reasonably to believe that he possesses. . . .²⁶

The application of the nonfeasance-misfeasance distinction to a defendant insurer being sued for negligence in performing a gratuitous inspection was first expressed and illustrated in *Nelson v. Union Wire Rope Corp.*, as it was being considered by the Appellate Court²⁷ and Supreme Court²⁸ of Illinois. The Appellate Court was of the opinion that section 325 of the *Restatement of Torts*²⁹ was controlling and absolved the insurer of liability for nonfeasance. The Supreme Court, in overruling the decision of the Appellate Court, held that the insurer had breached the duty to inspect with care and was guilty of misfeasance under section 323(1) of the *Restatement*.³⁰

The *Nelson* case was an action by injured employees against a workmen's compensation carrier which had reserved the right to inspect the practices and equipment of the plaintiffs' employer. The employer, a general contractor constructing a courthouse in Florida, operated a hoist in the course of the work. The injuries occurred when a cable, which supported the hoist, snapped, sending it and the eighteen plaintiffs aboard to the ground from a height of six floors. An action was instituted against

defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse and has merely failed to benefit him by interfering in his affairs." (*Id.* at 523).

²⁵ RESTATEMENT, TORTS § 325 (1934).

²⁶ *Id.* § 323 (1).

²⁷ 39 Ill. App. 2d, 73, 187 N.E.2d 425 (1963).

²⁸ *Supra* note 15.

²⁹ *Supra* note 25.

³⁰ *Supra* note 25, § 323.

the insurer,³¹ alleging that it "had undertaken to inspect the employer's safety practices and machinery, including the hoist, and [that] having thus assumed the duty to make safety inspections, was negligent in the performance of such duty in regard to the hoist. . . ."³² The Appellate Court found no such undertaking. In considering the scope of the insurer's undertaking, the Appellate Court limited its inquiry to the conduct of the insurer's safety engineer at the job-site. The Appellate Court accepted the testimony of the insurer's safety engineering that he had visited the courthouse project only seven times over a seventeen month period and had been there only one time in the five months preceding the accident. Further, the employer's superintendent testified that the contractor had its own safety program and that it did not rely on any outsiders to make inspections.³³ There was also evidence that the recommendations of the insurer's engineer "covered the general area of housekeeping,"³⁴ that they "were complied with so long as they were reasonable,"³⁵ that the engineer "did not check to see if they were acted upon,"³⁶ that the engineer gave no orders to the contractor's employees, and that he "had no control over them."³⁷ On the basis of these facts, the Appellate Court held that the insurer had not created a risk or danger by its misfeasance, but was "charged only with nonfeasance, or failure to detect and report a risk, or dangerous condition, already existing."³⁸ Thus, finding nonfeasance without reliance, the court absolved the insurer of liability.

The Supreme Court, on the other hand, rejected the analysis of the Appellate Court and considered all the circumstances surrounding the accident, and not only the insurer's job-site activities. As to the job-site,

³¹ Suits were also filed against the employer and the manufacturer of the cable. However, the jury found them not guilty of negligence and the judgments entered in their favor were affirmed by the Supreme Court. *Supra* note 15, at 72, 199 N.E.2d at 772-73.

³² *Supra* note 27, at 85, 187 N.E.2d at 429.

³³ See 14 SYRACUSE L. REV. 710, 712, n. 15 (1963). "One of plaintiffs' witnesses testified that an employee of the general contractor had made regular inspections to determine the safety of the hoist. Another witness, the foreman for the general contractor, when asked whether or not he relied upon the inspection of the insurance company replied, 'No, Sir.' (Citation omitted.) But does this conclusively show lack of reliance by plaintiff employees?" (Emphasis in original.)

³⁴ *Supra* note 27, at 114, 187 N.E.2d at 443.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Id.* at 122, 187 N.E.2d at 448. The Appellate Court then went on to conclude that the "course of conduct did not evidence a voluntary undertaking to make any more thorough or more frequent inspections of the hoist than those which were actually performed, [and that more thorough and more frequent inspections were] far beyond the scope of [the insurer's] voluntary undertaking to furnish limited safety engineering services. . . ." (*Id.* at 123-24, 187 N.E.2d 448).

the Supreme Court found that the insurer's engineer had been there many more times than his testimony indicated.³⁹ More significantly, the Supreme Court noted that the insurer conducted an extensive advertising campaign in both national and trade publications extolling its safety inspection service and constantly representing the countless benefits which accrued from the service.⁴⁰ The impression left by these advertisements "was that the safety engineers took an active part in the safety programs of the insureds and saved lives, limbs and money."⁴¹ In addition the Supreme Court found that the insurer's engineer had made several reports to the insurance company concerning the job-site, referring to it as a "catastrophe" with "serious" hazards,⁴² that while the contractor did have its own safety program it did not employ any safety engineers, and that the insurer's engineers had written letters to the contractor commenting on various safety practices and their intention to assist the contractor in the control of his accident possibilities. This evidence led the Supreme Court to conclude that the scope of the insurer's undertaking included making a thorough inspection with due care. The Court discarded the conservative approach of the Appellate Court which centered exclusively on the insurer's limited job-site activities. Taking into consideration the expansive scope of all the insurer's activities and representations, the Supreme Court felt that a resultantly broad undertaking arose, which was categorized as misfeasance when performed carelessly.

The Supreme Court criticized the Appellate Court's rejection of section 323(1) of the *Restatement of Torts*⁴³ as being "properly applicable only in situations involving active negligence or misfeasance."⁴⁴ The fault

³⁹ "[W]hile it was [the engineer's] testimony that he made but seven visits to the site . . . witnesses for plaintiff testified he was on the site more frequently." *Supra* note 15, at 81, 199 N.E.2d at 777. The testimony was to the effect that the engineer had been on the job-site anywhere from fifteen times up to three times a week before the accident occurred. *Supra* note 27, at 112, 187 N.E.2d at 442-43 n. 20.

⁴⁰ The Supreme Court considered these representations sufficiently important to reproduce several in the opinion. Some of them are as follows: "(1) 'In case after case month after month, [the insurer's] safety engineering service has helped contractors all over the country reduce accidents and costs;' (2) that insureds 'have worked hand in hand with [the insurer] to build safety into every job;' (3) after explaining that one insured had saved money, the method was stated to be: 'Close cooperation between [the insured] and [the insurer] in designing and operating an effective safety program;' (4) 'Thanks to thorough investigation and hazard analysis . . . and immediate investigations when accidents have occurred this nationally known firm has been able to maintain a good accident record and to lower operating costs.'" *Supra* note 15, at 79-80, 199 N.E.2d at 776.

⁴¹ *Supra* note 15, at 80, 199 N.E.2d at 776.

⁴² *Id.* at 82, 199 N.E.2d at 777.

⁴³ RESTATEMENT, TORTS § 325 (1934).

⁴⁴ *Supra* note 27, at 129, 187 N.E.2d at 451.

which the Supreme Court found with this line of reasoning was that it made misfeasance tantamount to the creation of a new risk or danger and sustained the conclusion that the only duty owed by one who acts gratuitously is to refrain from positive acts of negligence. This, the Court held, was erroneous because in those cases where insurers were liable for negligent, gratuitous inspections,⁴⁵ "liability rested upon a breach of duty to make the inspections with due care, not upon acts which 'created' dangers. . . ."⁴⁶ Further, the Court ruled that reliance was not a condition to holding the insurer liable. The Appellate Court had announced that even if a thorough inspection had been within the scope of the insurer's undertaking, no liability could result since the plaintiffs had not relied on the insurer to render its inspection service.⁴⁷ The Supreme Court held that this rule was applicable only if the insurer was guilty of nonfeasance, i.e., "omitting to perform an undertaking which plaintiffs . . . relied upon it to undertake. . . ."⁴⁸ But the insurer was charged with misfeasance, and having undertaken to act, the insurer "became subject to a duty with respect to the manner of performance."⁴⁹

The differing conclusions reached by the Appellate and Supreme Courts as to whether the insurer's conduct amounted to nonfeasance or misfeasance demonstrate their varying concepts of a negligent, gratuitous undertaking.⁵⁰ The *Nelson* case is particularly significant for having clarified the status of the nonfeasance-misfeasance distinction and the reliance requirement in suits involving gratuitous inspections by insurers. Before *Nelson*, cases on this point had only spoken in the language of the distinction between misfeasance and nonfeasance, had touched on or alluded to it, but had not precisely expanded on its importance, although it was clear that the distinction underlied these decisions. Thus in *Urwelling v. Crown Coach Corp.*⁵¹ and *Viducich v. Greater N.Y. Mut. Ins.*

⁴⁵ Cases cited notes 3, 5, and 11 *supra*.

⁴⁶ *Supra* note 15, at 75, 199 N.E.2d at 774.

⁴⁷ *Supra* note 27, at 133, 187 N.E.2d at 453.

⁴⁸ *Supra* note 15, at 85, 199 N.E.2d at 779.

⁴⁹ *Ibid.*

⁵⁰ 53 ILL. B. J. 349 (1964). "The conflict as to whether the facts in [the *Nelson*] case constituted misfeasance or nonfeasance evidences a dichotomy between the courts with respect to the underlying theory of negligence liability for a gratuitous undertaking. The Appellate Court viewed the undertaking as a series of isolated acts which the defendant was required to perform. Failure to perform any single act constituted nonfeasance and would require reliance to be actionable. The Supreme Court, however, viewed the undertaking as a single undertaking consisting of a series of acts. The nonperformance of any single act would then constitute negligent performance of the entire undertaking, i.e. misfeasance, which does not require reliance to be actionable." (*Id.* at 353).

⁵¹ *Supra* note 12.

Co.,⁵² where the insurer's activities were negligible, the courts held that no duty to inspect with due care arose, but they did not expressly designate the activities as nonfeasant.⁵³ Similarly, in those cases wherein recovery was allowed against the insurer,⁵⁴ the courts stressed the sufficiency of the insurer's activity without concretely mentioning nonfeasance or misfeasance.⁵⁵

The Supreme Court of Illinois in the *Nelson* case, by its discussions of the nonfeasance-misfeasance distinction, also shed light on the requirement of reliance. The Court clearly adopted the rule that reliance is not necessary for liability if the insurer was misfeasant, rather than nonfeasant, and had a duty to inspect with due care. Of this, some legalists have said that the *Nelson* case is the first of its kind to predicate liability on a basis other than reliance.⁵⁶ They attempt to support their position by referring to the following passage from *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*,⁵⁷ a case where facts clearly indicated that the insurer was guilty of misfeasance. The court stated:

these facts of continuous conduct . . . in reference to the inspections and their purpose—if relied upon by the Brewing Company and so understood by the Insurance Company, as alleged—are of probative force to show both the undertaking of duty and relation of the parties upon which the action for negligence in performance thereof may be predicated.⁵⁸

⁵² *Vidulich v. Greater N.Y. Mut. Ins. Co.*, 80 N.J. Super. 15, 192 A.2d 596 (Super. Ct. 1963).

⁵³ In *Ulwelling v. Crown Coach Corp.*, *supra* note 12, at 134, 23 Cal. Rptr. at 654, the court stated "that the [inspections] were not of such a nature or performed under such circumstances as to impose any duty . . . to make any kind of inspection. . . ." In *Vidulich v. Greater N.Y. Mut. Ins. Co.*, *supra* note 52, the court after citing § 325 of the RESTATEMENT OF TORTS, *supra* note 25, said "defendant did nothing which could have led [the employer] or any employee to believe that defendant has undertaken to make inspections. . . ." (*Id.* at 23, 192 A.2d at 601).

⁵⁴ *Hartford Steam Boiler Inspection and Ins. Co. v. Pabst Brewing Co.*, 201 Fed. 617 (7th Cir. 1912); *Van Winkle v. American Steam-Boiler Ins. Co.*, 52 N.J.L. 240, 19 Atl. 472 (1890); *Sheridan v. Aetna Cas. & Sur. Co.*, 3 Wash. 2d 423, 100 P.2d 1024 (1940) and cases cited notes 5 and 11 *supra*.

⁵⁵ *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.*, *supra* note 54 (insurer manifested "continuous conduct" in reference to inspections); *Smith v. American Employers' Ins. Co.*, *supra* note 5 (insurer conducted monthly inspections); *Van Winkle v. American Steam-Boiler Inc. Co.*, *supra* note 54 (insurer made repeated inspections and furnished employer with certificates); *Bollin v. Elevator Constr. & Repair Co.*, *supra* note 11 (statutory duty arose by contract); *Sheridan v. Aetna Cas. & Sur. Co.*, *supra* note 54 (insurer made six inspections in eighteen months, made reports and sent letters).

⁵⁶ 53 ILL. B. J., *supra* note 50, at 353. Cf., *Nelson v. Union Wire Rope Corp.*, *supra* note 15 (Schaefer, J. dissenting); 51 VA. L. REV. 347 (1965).

⁵⁷ *Supra* note 54.

⁵⁸ *Id.* at 629.

Because of the reference to reliance, these writers urge that in the past reliance was an essential requirement for liability regardless of whether the insurer was nonfeasant or misfeasant.

However, the court in the *Hartford Steam Boiler* case was confronted with the defense that the insurer was not in privity with the plaintiff, a defense which was a far more formidable obstacle to recovery when this case was decided than it is today.⁵⁹ Reliance was mentioned by the court in an effort to find a tort duty which ran from defendant to plaintiff. The court then disregarded the reliance factor and emphasized the degree of the insurer's activities, citing numerous cases showing that much activity directed to a gratuitous undertaking gives rise to a duty to perform it with care. If the court intended reliance to be essential to recovery, it did not make the point clear, but rather phrased the opinion in such a fashion that it could be interpreted to equate an active, negligent gratuitous undertaking with a breach of the duty to perform the undertaking with care, i.e. a misfeasant performance of the undertaking. Further, in the other cases finding the insurer liable, reliance was not discussed.⁶⁰ Yet, in the cases where the insurer's activity was slight and his performance nonfeasant,⁶¹ liability did not arise because the courts expressly found that there was no reliance.

The *Nelson* case seems to be the first clear statement that reliance is not a condition to liability for misfeasance, rather than the first case to abrogate reliance in misfeasance cases. The rule adopted by the Court is that if the insurer's activities are sufficient to give rise to an undertaking, then liability will follow when the undertaking is not performed with due care. Any inquiry into the element of reliance here is immaterial because a negligent performance of an undertaking constitutes misfeasance. But where the activity is slight so as to properly be labeled nonfeasance, reliance is indispensable to liability. This distinction, which the

⁵⁹ In *Nelson v. Union Wire Rope Corp.*, *supra* note 15, the insurer also raised the defense of lack of privity, and in addition, contended that it did not control the employer's equipment or employees. In disposing of these defenses, the Supreme Court allotted one paragraph to each in its fifty-two page opinion. (*Id.* at 84-85, 199 N.E.2d at 778-79).

⁶⁰ *Van Winkle v. American Steam-Boiler Ins. Co.*, *supra* note 54; *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960); *Bollin v. Elevator Constr. & Repair Co.*, *supra* note 11; *Sheridan v. Aetna Cas. & Sur. Co.*, *supra* note 54. But see, 53 ILL. B. J., *supra* note 50. "In *Van Winkle v. American Steam Boiler Company* no express reference was made to reliance. However the court found that the activity of the defendant insurer was so extensive that the insurer had effectively substituted its inspection for that of the insured. The substitution principle announced by the Van Winkle court appears to be an expression of total reliance by the insured." (*Id.* at 353). (Footnote omitted.)

⁶¹ *Ulwelling v. Crown Coach Corp.*, *supra* note 12; *Viducich v. Greater N.Y. Mut. Ins. Co.*, *supra* note 52.

earlier cases struggled with, was sharply brought to the fore by the Illinois Supreme Court in the *Nelson* case.

WORKMEN'S COMPENSATION CARRIER AS A THIRD PARTY
TORTFEASOR—THE PROBLEM OF IMMUNITY

From the preceding discussion, with its pivotal point being the *Nelson* case, it has been seen that liability can be incurred on a gratuitous undertaking. In the sphere of insurers, liability has arisen out of careless safety inspections, since such inspections are gratuitous undertakings. But a condition to liability for negligent inspection is that the activity of the insurer is sufficient to constitute misfeasance, or that the insurer was non-feasant in respect to the inspections and the plaintiff relief, to his detriment, on the inspections being made. This much applies to insurers in general, but several factors which add to the complexities of the topic under discussion have not, as yet, been included. Henceforth, the discussion will be addressed specifically to the right of inspection reserved by insurers where: (1) the insurer is a workmen's compensation carrier, (2) the plaintiff is an employee of the employer insured by the carrier, (3) the employee's injuries are proximately caused by the carrier's negligent, gratuitous inspection, and (4) the employee's injuries are also compensable under a compensation statute. Under these circumstances, such matters as statutory immunity, policy considerations, and others, to be discussed, must be considered in determining if the employee's action is or ought to be maintainable. However, in order to achieve a better understanding of these considerations a general discussion of workmen's compensation is necessary.

Workmen's compensation statutes arose out of dissatisfaction with the old, slow, and expensive tort system of employer's liability: founded on proof of the employer's negligence, subject to the employer's defenses of contributory negligence, assumption of the risk, and negligence by a third party employee which worked to prevent workmen from recovering for injuries they had sustained.⁶² They were enacted to provide a mechanism for the speedy payment of wage and medical losses to injured employees⁶³ by eliminating the tort concept of fault and imposing strict liability for a work connected injury.⁶⁴ For those employees covered by a

⁶² Report of Special Committee Appointed to Study the Workmen's Compensation Law and to Cooperate with the Moreland Act Commission Investigating Workmen's Compensation Costs, Operations and Procedures, New York State Bar Association 6-7 (1957).

⁶³ 1 LARSON, WORKMEN'S COMPENSATION § 1 (1965).

⁶⁴ *Id.* § 2.10.

statute,⁶⁵ workmen's compensation is intended to compensate for economic loss, not for physical injury.⁶⁶ As such, the recovery by a claimant of his statutory claim is not as large as his judgment could have been had he sued in a common law negligence action,⁶⁷ but this is the consideration given by the employee in exchange for fast compensation of work injuries regardless of fault.⁶⁸ In addition, a workmen's compensation statute deprives the employee of all other rights and remedies in regard to his injury that he would otherwise have had against his employer.⁶⁹ But while an employer enjoys immunity from a common law action of an employee, some others do not, and all American jurisdictions preserve the employee's tort action against a third party tortfeasor who has proximately caused his injury.⁷⁰ Against which third party tortfeasors a com-

⁶⁵ Not all wage-earners are entitled to benefits under workmen's compensation statutes for job connected injuries. U.S. DEP'T OF LABOR, BUREAU OF LABOR STANDARDS, BULL. 161, STATE WORKMEN'S COMPENSATION LAWS AS OF MAY 1960, 13, TABLE 2; Chamber of Commerce of the U.S., Analysis of Workmen's Compensation Laws as of January 1962, 25, Chart IV (a).

⁶⁶ Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 Wis. L. Rev. 57, 81 (1963). For an extensive bibliography of literature on workmen's compensation see, McDermott, *The Law of Workmen's Compensation and Employer's Liability: A Selected List of Materials, 1950-1963*. 16 VAND. L. REV. 1159 (1963).

⁶⁷ For a discussion of the general tendency toward higher verdicts see, Belli, *The Adequate Award*, 39 CALIF. L. REV. 1 (1951).

⁶⁸ Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. IND. & COM. L. REV. 555-56 (1963).

⁶⁹ McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers*, 37 TEXAS L. REV. 389, 392-93 (1959). E.g., ILL. REV. STAT. ch. 48, § 138.5 (a) (1965). "No common law or statutory right to recover damages from the employer or his employees for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury."

⁷⁰ 5 U.S.C. § 776 (1964); 33 U.S.C. § 933 (1964); ALA. CODE tit. 26 § 312 (Cum. Supp. 1963); ALASKA STAT. § 23.30.015(a) (1962); ARIZ. REV. STAT. ANN. § 23-1023 (Cum. Supp. 1965); ARK. STAT. ANN. § 81-1340 (1960); CALIF. LAB. CODE § 3852 (Deering 1964); COLO. REV. STAT. ANN. § 81-13-8 (1963); CONN. GEN. STAT. ANN. § 31-156 (1958); DEL. CODE ANN. tit. 19 § 2363 (Cum. Supp. 1964); D.C. CODE ANN. § 36-501 (1961); FLA. STAT. ANN. § 440-39 (Cum. Supp. 1965); GA. CODE ANN. § 114-403 (Supp. 1965); GOV. CODE TERR. GUAM § 37003 (1960); HAWAII REV. LAWS § 97-8 (Supp. 1963); IDAHO CODE ANN. § 72. 204 (1947); ILL. REV. STAT. ch. 48, § 138.5(b) (1965); IND. ANN. STAT. § 40-1213 (1965); IOWA CODE ANN. § 85.22 (Cum. Supp. 1965); KAN. STAT. ANN. § 44-504 (1963); KY. REV. STAT. ANN. § 342.055 (1963); LA. REV. STAT. ANN. § 23: 1101 (West 1964); ME. REV. STAT. ANN. ch. 39, § 68 (West 1964); MD. CODE ANN. art. 101 § 58 (1964); MASS. ANN. LAWS ch. 152, § 15 (1962); MICH. STAT. ANN. § 17.189 (1960); MINN. STAT. ANN. § 176.061 (Supp. 1965); MISS. CODE ANN. § 6998-36 (1952); MO.

mon law tort action can be maintained depends on the individual statute.⁷¹ Thus a fellow employee may be immune from such an action either by statute⁷² or judicial decision,⁷³ or similarly a contractor may not be subject to suit.⁷⁴

The question of immunity is a recurrent one in common law actions by an employee against the compensation carrier. In some jurisdictions, the insurer is expressly granted immunity by statute or through judicial interpretation.⁷⁵ Where immunity is not expressly provided for, insurers have raised the defense that they step into the shoes of the employer and are immune from an action by an employer on that basis. This defense

ANN. STAT. § 287.150 (1965); MONT. REV. CODES ANN. § 92-204 (1947); NEB. REV. STAT. § 48-118 (1960); NEV. REV. STAT. § 616.560 (1963); N.H. REV. STAT. ANN. § 281: 14 (Supp. 1965); N.J. STAT. ANN. § 34: 15-40 (1959); N.M. STAT. ANN. 59-10-69 (Supp. 1957); N.Y. WORK. COMP. LAW § 29 (1) (6) (1962); N.C. GEN. STAT. § 97-10.2 (1963); N.D. CENT. CODE § 65-01-09 (Supp. 1965); OKLA. REV. STAT. ANN. tit. 85, § 44 (1952); ORE. REV. STAT. § 656.154 (1966); PA. STAT. ANN. tit. 77, § 671 (Cum. Supp. 1965); P. R. LAWS tit. 11, § 32 (1962); R.I. GEN. LAWS ANN. § 28-35-58 (Supp. 1965); S.C. CODE ANN. §§ 72-122, 72-401 (1962); S.D. CODE § 64.0301 (1939); TENN. CODE ANN. § 50-914 (Cum. Supp. 1965); TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Cum. Supp. 1965); UTAH CODE ANN. § 35-1-62 (1966); VT. STAT. ANN. tit. 21, § 624 (Cum. Supp. 1966); VIR. ISL. CODE ANN. tit. 24, § 263 (1962); VA. CODE ANN. § 65.38, 65.99 (1950); WASH. REV. CODE ANN. § 51.24.010 (1962); WIS. STAT. ANN. § 102.29 (1957); WYO. STAT. ANN. § 27-154 (1957). Ohio and West Virginia have no specific statutory provisions allowing a third party action, but they have been acknowledged by case law. *Trumbull Cliffs Furnace Co. v. Shachovsky*, 110 Ohio St. 208, 146 N.E. 306 (1924); *Merrill v. Marietta Torpedo Co.*, 79 W.Va. 669, 92 S.E. 112 (1917).

⁷¹ For a classification of workmen's compensation statutes according to their immunity provisions see, McCoid, *supra* note 69, at 403-04. Professor McCoid sets up four categories: "first, those statutes which recognize a right of action against 'persons other than the employer' or 'third persons,' which comprise the majority of statutes in the United States. Second, those statutes which recognize a right of action against 'persons other than the employer' but also contain provisions to the effect that if the employer has insured his liability under the act the compensation benefits shall be the exclusive remedy against 'the employer and those conducting his business' or against every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of that employer's business and does not inflict any injury with deliberate intention.' . . . Third, those statutes which recognize a right of action against 'any person not in the same employ.' . . . Fourth, those statutes which make no provision for third party liability." (Footnotes omitted).

⁷² E.g., ILL. REV. STAT. ch. 48, § 138.5(a) (1965); TEX. REV. CIV. STAT. ANN. art. 8306 § 3 (Cum. Supp. 1965); VA. CODE ANN. § 65-99 (1950).

⁷³ *White v. Ponozzo*, 77 Idaho 276, 291 P.2d 843 (1955); *Bresnahan v. Barre*, 286 Mass. 593, 190 N.E. 815 (1934).

⁷⁴ See, 2 LARSON, *op. cit. supra* note 63, § 74.10-40; 3 SCHNEIDER, WORKMEN'S COMPENSATION § 842 (perm. ed. 1941 Cum. Supp. 1958, Supp. 1964).

⁷⁵ IND. ANN. STAT. § 40-1206 (1965); MISS. CODE ANN. § 6998-36 (1952); MO. ANN. STAT. § 287.300 (1965); N.H. REV. STAT. ANN. § 281:14 (Supp. 1965); N.M. STAT. ANN. § 59 10-4 (F) (1953); TEX. REV. CIV. STAT. ANN. art. 8306 § 3 (Cum. Supp. 1965).

has met with success in a majority of jurisdictions where employees have sued the workmen's compensation carrier.⁷⁶ In *Sarber v. Aetna Life Ins. Co.*,⁷⁷ the court held that by the California Workmen's Compensation Act subrogation provision, the carrier was "subrogated to all the rights and duties of the employer,"⁷⁸ including the right to the employer's immunity. In *Flood v. Merchants Mut. Ins. Co.*,⁷⁹ the court, in interpreting the Maryland Workmen's Compensation Law, held "that when the Legislature . . . authorized employers to contract with insurance companies in order to cover possible claims . . . it intended the insurance carrier to stand in the position of the employer."⁸⁰ Also in *Schultz v. Standard Acc. Ins. Co.*,⁸¹ the subrogation provision of the Idaho Compensation Act was interpreted to deny the employee's right to maintain the action.

In a few jurisdictions, the insurer's contention of immunity has been rejected.⁸² Generally, the courts here have interpreted the various compensation statutes as extending immunity only to employers in the strictest sense.⁸³ They have also sought to distinguish the cases granting immunity to the insurer⁸⁴ on several bases. One such ground is that the cases immunizing the insurer⁸⁵ involve fact situations where injury or death resulted from aggravation of industrial injuries by the treatment of doctors furnished or employed by insurance carriers pursuant to policy or statutory obligation, rather than from a negligent gratuitous safety inspection. Under these circumstances, it is argued that these cases are not in point and cannot be considered controlling authority. It is urged that,

⁷⁶ *Sarber v. Aetna Life Ins. Co.*, 23 F.2d 434 (9th Cir. 1928); *Donohue v. Maryland Cas. Co.*, 248 F. Supp. 558 (D. Md. 1965); *Kotarski v. Aetna Gas. and Sur. Co.*, 244 F. Supp. 547 (E.D. Mich. 1965); *Schultz v. Standard Acc. Ins. Co.*, 125 F. Supp. 411 (E.D. Wash. 1954); *Fernandez v. Gantz*, 113 F. Supp. 763 (D.D.C. 1953); *Noe v. Travelers Ins. Co.*, 172 Cal. App. 2d 731, 342 P.2d 976 (1959); *Flood v. Merchants Mut. Ins. Co.*, 230 Md. 373, 187 A.2d 320 (1963); *McDonald v. Employers' Liab. Assur. Corp.*, 288 Mass. 170, 192 N.E. 608 (1934); *Hughes v. Maryland Cas. Co.*, 76 S.W.2d 1101 (Kans. City Ct. of App. 1934); *Aetna Life Ins. Co. v. Watts*, 148 Okla. 28, 296 Pac. 977 (1931).

⁷⁷ *Supra* note 76.

⁷⁸ *Id.* at 435.

⁸⁰ *Id.* at 377, 187 A.2d at 322.

⁷⁹ *Supra* note 76.

⁸¹ *Supra* note 76.

⁸² *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174 (3d Cir. 1963); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 796 (1964) (interpreting Florida Compensation Act); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 121 N.W.2d 361 (1963); *Smith v. American Employers' Ins. Co.*, *supra* note 55; *Mager v. United Hosps. of Newark*, 88 N.J. Super. 421, 212 A.2d 664 (App. Div. 1965).

⁸³ E.g., *Mager v. United Hosps. of Newark*, *supra* note 82, at 426, 212 A.2d at 666. "The definition of 'employer' in the Workmen's Compensation Act negatives the argument that the employer and his compensation carrier must be considered as one and the same."

⁸⁴ *Supra* note 76.

⁸⁵ *Ibid.*

(1) the act of inspecting is not performed by the carrier pursuant to specific provisions of a compensation statute directing such performance by the carrier, as is the case in the malpractice situation,⁸⁶ and that, (2) in the aggravated injury circumstances, the negligence of the carrier is not the cause of the original injury, as it is where there has been a negligent inspection.⁸⁷ As was stated by the Supreme Court of New Hampshire in *Smith v. American Employers' Ins. Co.*,⁸⁸ when distinguishing that case from the malpractice case of *Schultz v. Standard Acc. Ins. Co.*:⁸⁹

[I]n the case before us, contrary to the situation in the Schultz case, the defendant is not being sued because of anything it did pursuant to either our compensation statute or the policy of compensation insurance issued by it, but because of independent action undertaken which it is alleged resulted in the plaintiff's injuries.⁹⁰

The distinction drawn between a statutory and a common law duty has not been persuasive to courts or legislatures since it was first espoused in the *Smith* case.⁹¹ In fact, in the next session of the New Hampshire legislature the holding in the *Smith* case was overruled by amending the New Hampshire Workmen's Compensation Act to equate the carrier with the employer⁹² and expressly grant the carrier immunity from a third party action.⁹³

In recent cases involving actions by employees against compensation carriers for negligent inspections, rather than aggravation of injuries,⁹⁴ the courts not only noted that the safety inspections are an integral part of the carrier's function, but also that an employer, pursuant to his duty to provide a safe working place for his employees, has the duty to make safety inspections.⁹⁵ If the employer breaches this common law duty and an employee is injured as a result thereof, an action by the employee

⁸⁶ See 26 NACCA L. J. 223, 225-26 (1960).

⁸⁷ See 31 J. AM. TRIAL LAW. A. 299, 315-16 (1965).

⁸⁸ *Supra* note 55.

⁸⁹ *Supra* note 76.

⁹⁰ *Smith v. American Employers' Ins. Co.*, *supra* note 55, at 537-38, 163 A.2d at 570 (*opinion on rehearing*).

⁹¹ *Supra* note 55.

⁹² N.H. REV. STAT. ANN. § 281: 2 (1961).

⁹³ N.H. REV. STAT. ANN. § 281: 14 (Supp. 1965). "When an injury for which compensation is payable . . . has been sustained under circumstances creating in some person other than the employer, or the employer's insurance carrier, a legal liability to pay damages in respect thereto, the injured employee . . . may obtain damages from or proceed at law against such person to recover damages. . . ."

⁹⁴ *Donohue v. Maryland Cas. Co.*, *supra* note 76; *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76.

⁹⁵ *Long Co. v. State Acc. Fund*, 156 Md. 639, 144 Atl. 775 (1929).

against the employer in tort is barred by the exclusivity provisions of the workmen's compensation statute, just as it would be had the employer breached a statutory duty. This being so, the courts find no meaningful reason for granting immunity to an insurer when it performs a duty imposed on the employer by statute, but refusing immunity when the insurer performs a duty imposed on the employer at common law.⁹⁶ In both instances the insurer steps into the shoes of the employer and should be immune, since it is the performance of the required duty, rather than the duty's origin, which is the relevant factor. Further, it is not the activity of the carrier upon which immunity is predicated. Immunity either does or does not exist in proportion to the closeness of the relationship between the carrier and the employer. In *Kotarski v. Aetna Cas. and Sur. Co.*,⁹⁷ the court stated:

[I]t is not so much what the insurance carrier is doing that makes it immune, it is the relationship of the carrier and the employer. Certainly, an employer does not lose its statutory immunity whenever it does something not required by the compensation act. If the activity of the insurer, for which it was alleged to be negligent, bore no substantial relationship to its position as the employer's workmen's compensation carrier,⁹⁸ . . . there would be no logical reason to hold the carrier immune. However, where the carrier is performing an integral part of its function under the Workmen's Compensation Act, it should be immune under the same reasoning which makes it immune when performing a required activity.⁹⁹

Another ground announced by the courts denying the insurer immunity and distinguishing those cases granting immunity is the variations in the particular compensation statutes. All of the courts agree that the problem of immunity is one of statutory interpretation, and where immunity has been refused, the courts, of course, were of the opinion that proper construction of the statute led to the conclusion that immunity was not intended. In fact, even after the New Hampshire Legislature had passed the amendment¹⁰⁰ overruling the *Smith* case,¹⁰¹ the court in *Fabricius v. Montgomery Elevator Co.*¹⁰² and *Mays v. Liberty Mut. Ins. Co.*,¹⁰³

⁹⁶ *Donohue v. Maryland Cas. Co.*, *supra* note 76, at 591-92.

⁹⁷ *Supra* note 76.

⁹⁸ Here the court gave its own example of an activity which would not be substantially related to the insurer's position as a compensation carrier. The example is: "if an automobile collision occurred between the employee, while driving his employer's vehicle on the employer's business, and a vehicle operated by the insurance company's employee who also happened to be acting in the course of his employment. . . ." *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76.

⁹⁹ *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76, at 558.

¹⁰⁰ See notes 92 and 93 *supra*.

¹⁰¹ *Supra* note 55.

¹⁰² *Supra* note 82.

¹⁰³ *Ibid.*

mentioned that the subsequent action by the Legislature was not an indication that the New Hampshire Supreme Court had misinterpreted the statute before it was amended.¹⁰⁴ However, the differences in the statutes do not appear to be as significant as the difference of philosophies used in interpreting the statutes. Basically, the decision to grant or deny the insurer immunity turns on whether the particular court considers workmen's compensation statutes as exclusive substitutes for common law liability. If they do, then an action against a third party tortfeasor for injuries which resulted from a job related accident must be specifically provided for in the statute; otherwise, the employee would be subject to the absolute provisions of the workmen's compensation system. If the court does not accept the view that the compensation statute is an exclusive substitute, then the employee can proceed against any third party not specifically immunized by the statute, since, under this theory, the statute in no way impairs the right to bring such a suit. The thinking of the courts denying immunity is perhaps best illustrated by the following from *Fabricius v. Montgomery Elevator Co.*:¹⁰⁵ "If the employee's common law action is taken from him, what has done so? Certainly it cannot be the insurance policy. We do not find a statute that *imperatively compels that result.*"¹⁰⁶

Conversely, where immunity has been granted, the courts emphasize the statutory basis of the employee's action¹⁰⁷ and examine their statute for a provision or legislative intent allowing it. Since no workmen's compensation statute specifically sanctions an action by an employee against a carrier, these courts read their compensation act as a whole to determine if the employee's suit was envisioned.¹⁰⁸ Thus, with the scope of the inquiry being so broadly based, these courts can readily find that the action was not intended and that the carrier is immune.

The difference in interpretative philosophies also explains the varying conclusions reached by the courts on the issue of subrogation and the insurer's so-called double-recovery defense. Most workmen's compensation statutes have subrogation provisions of some sort whereby the payor

¹⁰⁴ *Mays v. Liberty Mut. Ins. Co.*, *supra* note 82, at 177; *Fabricius v. Montgomery Elevator Co.*, *supra* note 82, at 1327, 121 N.W.2d at 365.

¹⁰⁵ *Supra* note 82.

¹⁰⁶ *Id.* at 1325, 121 N.W.2d at 364-65. (Emphasis added.) The opinion then went on to state that "it is the policy of this court not to interpret a statute as depriving one of a common law right unless the statute clearly so states." (*Id.* at 1327, 121 N.W.2d at 366).

¹⁰⁷ In *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76, the court said that, "an action by an employee for a compensable injury caused by a third party, while a common law and not a statutory cause of action, is regulated by statute." (*Id.* at 559). (Footnote omitted.)

¹⁰⁸ *Id.* at 552.

of the compensation is subrogated to the rights of the payee-employee whenever the employee recovers damages from a third party tortfeasor. The result is that the payor is reimbursed for any compensation paid and the employee retains the balance of the judgment.¹⁰⁹ Commonly, subrogation provisions allow the payor to bring the action against the third party,¹¹⁰ or give the payor a lien against any recovery by the employee for compensation paid or payable.¹¹¹ In those jurisdictions where the carrier is by statute compelled to pay compensation directly to the employee, it has contended that it must be immune from a suit by the employee since it is impossible, thereafter by subrogation, to sue or have a lien against itself.

The courts denying immunity have not accepted this argument. They have held that these provisions are merely procedural, do not apply to the subject matter of the employee's third party action, and, therefore, can have no effect on it. Further, they do not feel that these provisions allow the employee to recover twice, once on his compensation claim and again in his common law suit, but instead interpret the statutes to give a set off to the insurer for compensation paid.¹¹² The courts granting immunity agree that this interpretation adequately protects the insurer, but deny the validity of the interpretation. Rejecting the idea that the employee's third party action can exist without a statutory provision to that effect, these courts hold that the legislatures would never have enacted subrogation provisions had they anticipated the insurer being held liable as a third party tortfeasor.¹¹³ Thus finding legislative disapproval of the action, the insurer is granted immunity.

A final distinction drawn in these cases is whether the liability of the carrier to secure compensation is primary or secondary. If, by statutory mandate, the carrier assumes the obligations of the employer for payment of compensation directly to the employee who has suffered a job-connected injury its liability is primary. But if the statute imposes the duty on the employer to satisfy the liability which arises out of such injury, then the carrier is, in effect, a surety, and its duty to make payment to the employee is secondary to that of the employer's. Where the liability is secondary, as under the Florida statute¹¹⁴ considered in the *Nelson* case,¹¹⁵ immunity is denied. Where the liability is primary, as

¹⁰⁹ 2 LARSON *op. cit. supra* note 63, §§ 74.00-20.

¹¹⁰ *E.g.*, Flood v. Merchants Mut. Ins. Co., *supra* note 76.

¹¹¹ *E.g.*, Kotarski v. Aetna Cas. and Sur. Co., *supra* note 76.

¹¹² *Fabricius v. Montgomery Elevator Co.*, *supra* note 82, at 1325-26, 121 N.W.2d at 365.

¹¹³ *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76, at 553.

¹¹⁴ FLA. STAT. ANN. § 440-39 (Cum. Supp. 1965).

¹¹⁵ *Supra* note 82.

under the Michigan statute¹¹⁶ considered in *Kotarski v. Aetna Cas. and Sur. Co.*,¹¹⁷ immunity is granted. The reason for these holdings is that where the carrier's liability is secondary, and there is no inevitability of payment the essential requisite for immunity is missing,¹¹⁸ since "it is the liability to secure compensation which gives the employer immunity from suit as a third party tort-feasor."¹¹⁹ But where the insurer has the primary duty to secure workmen's compensation for the employees of the insured the insurer is entitled to immunity, since "it is this primary, unvariable responsibility which makes the workmen's compensation insurance carrier so vital to the effectiveness of the . . . workmen's compensation scheme. . . ."¹²⁰

The distinction between primary and secondary liability like those between the statutory and common law basis of a third party action and the difference in the compensation statutes, is much discussed by the courts in granting or denying immunity. Yet, the underlying theme common to all of these decisions is whether or not, in the opinion of the court, the workmen's compensation statute abrogated or left unaffected the employee's third party action. The *Kotarski* case,¹²¹ after devoting the usual space to the aforementioned distinctions, granted the carrier immunity, and concluded with the following passage directed at the applicability of the *Smith* and *Fabricius* cases from *Mager v. United Hosps. of Newark*,¹²² when the case was being decided by the New Jersey Superior Court, before its reversal by the Appellate Division:¹²³ "Despite these distinctions, the philosophy of these opinions would probably permit an action here, but I reject this philosophy."¹²⁴

POLICY CONSIDERATIONS

The question of whether a workman's compensation carrier is amenable to a tort action by an injured employee for a negligent, gratuitous safety inspection is a relatively new one. The development of this area of law lacks certainty and consistency because the cases which have considered the point cannot be regarded as having a time-honored precedent value,

¹¹⁶ MICH. STAT. ANN. § 17.189 (1960).

¹¹⁷ *Supra* note 76.

¹¹⁸ *Nelson v. Union Wire Rope Corp.*, *supra* note 82, at 98, 199 N.E.2d at 786.

¹¹⁹ *Jones v. Florida Power Corp.*, 72 So.2d 285, 287 (Fla. 1954), cited in *Nelson v. Union Wire Rope Corp.*, *supra* note 82, at 97, 199 N.E.2d at 785.

¹²⁰ *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76, at 557.

¹²¹ *Supra* note 76.

¹²² 81 N.J. Super. 585, 196 A.2d 282 (Super. Ct. 1963).

¹²³ *Supra* note 82.

¹²⁴ *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 76, at 559.

especially where the cases were decided by a sharply divided court,¹²⁵ and because the courts have developed several distinctions which can logically be manipulated to achieve either result in a given case. Under these circumstances, considerations of policy are of great importance since they may ultimately affect the side a court will choose to take. But again, as with the other factors considered in these cases, there is no unanimity on which aspects of policy should be emphasized.

No one denies the beneficial effect workmen's compensation statutes have had on the promotion of safety and the prevention of accidents.¹²⁶ While there are those who believe workmen's compensation in general and safety control in particular are better provided for by private insurers,¹²⁷ and those who feel a state fund system is preferable,¹²⁸ it is clear that a workmen's compensation system, in potential and in practice, reduces industrial injuries. It is this aspect of the system which some legislatures regard as the most significant.¹²⁹

The policy argument for denying the employee's action against the insurer is that the contribution to accident prevention made by insurers should not be overlooked and a continuation of their inspection activities should not be dampened by a possibility of "incurring unlimited liability for failing to discover a hazard that some jury might think ought to have been discovered."¹³⁰ The inspection services of insurers "should be encouraged rather than discouraged,"¹³¹ lest the insurers cease making inspections.

The contention that an activity which has been helpful in the past should not be the subject of litigation when it turns out to be harmful in the present is not at all impressive to those courts and authors who favor

¹²⁵ *Smith v. American Employers' Ins. Co.*, 102 N.H. 530, 163 A.2d 564 (1960), allowed the employee's action by a vote of three to two, and the decision was subsequently overruled by an amendment to the New Hampshire Workmen's Compensation Act. See notes 92 and 93 *supra*. *Nelson v. Union Wire Rope Corp.*, *supra* note 82, found the insurer liable in a four to three decision, and Justice Daily, whose vote was decisive for the majority in that case has since passed away.

¹²⁶ See Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 Wis L. Rev. 57, 63 (1963).

¹²⁷ St. Clair, *The Case For Private Insurance of Workmen's Compensation*, 31 ROCKY MT. L. REV. 397 *passim* (1959).

¹²⁸ Clayman, *In Defense of State Workmen's Compensation Funds*, 31 ROCKY MT. L. REV. 428 *passim* (1959).

¹²⁹ Massachusetts Commission on Compensation for Industrial Accidents Report 46 (1912).

¹³⁰ *Kotarski v. Aetna Cas. and Sur. Co.*, 244 F. Supp. 547, 558 (E.D. Mich. 1965). (Footnote omitted.)

¹³¹ *Nelson v. Union Wire Rope Corp.*, *supra* note 82, at 121, 199 N.E.2d 797 (House, J., dissenting).

the employee's third party action. They feel that this position is outweighed by the old, venerable maxim that an injury caused by legally wrongful conduct should be adequately compensated and point out that workmen's compensation does not and was never intended to adequately compensate an injured employee.¹³² This inadequacy and older policy justify the third party action.¹³³ Further, while they recognize the role played by insurers in accident prevention, the argument that the added liability will drive compensation carriers from the field is countered by the statement so often repeated that, by now, it has taken on proportions of a battlecry, rather than a rebuttal, viz., "No inspection is better than a negligent inspection."¹³⁴ They express the doubt that all insurers will discontinue their safety inspections,¹³⁵ since it is these same inspections which reduce accidents and, in the long run, will consequently reduce the overall cost of the insurers.¹³⁶ The result will be the initiation of more intensive inspection programs both quantitatively and qualitatively, by insurers.¹³⁷

It is true that not all insurers will discontinue their safety inspection practices, as the inspections must be made to protect their interests since "it would be economically foolish . . . to allow accidents which could be easily prevented to occur."¹³⁸ But it is improbable that these inspection programs will be stepped up. A negligent inspection may be worse than no inspection in a particular case, but, considering this statement in its entire context, it seems highly unlikely that most insurers will increase their inspection efforts in order to achieve an even better safety record. Insurance companies are "an inviting target when the plaintiff is interested in circumventing the limited recoveries permitted and the immuni-

¹³² Report of Special Committee Appointed to Study the Workmen's Compensation Law and to Cooperate with the Moreland Act Commission Investigating Workmen's Compensation Costs, Operations and Procedures, New York State Bar Association 7-8 (1957); Brodie, *supra* note 126, at 81.

¹³³ 51 VA. L. REV. 347, 349 (1965).

¹³⁴ *Mays v. Liberty Mut. Ins. Co.*, 323 F.2d 174, 178 (3d Cir. 1963); *Fabricius v. Montgomery Elevator Co.*, 254 Iowa 1319, 1327, 121 N.W.2d 361, 366 (1963); Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer in Tort*, 4 B.C. IND. & COM. L. REV. 555, 558, n. 19 (1963); 31 J. AM. TRIAL LAW. A. 299, 316 (1965) quoting from Brief for Appellant, p. 5, 115, *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964); 30 NACCA L. J. 247, 249 (1964); 51 VA. L. REV. 347, 351 (1965).

¹³⁵ See e.g., *Fabricius v. Montgomery Elevator Co.*, *supra* note 134, at 1327, 121 N.W.2d at 366.

¹³⁶ 51 VA. L. REV. 347, 352 (1965), citing LANG, WORKMEN'S COMPENSATION INSURANCE 112-16, 163-64 (1947).

¹³⁷ 53 ILL. B. J. 349, 354, n. 25 (1964), citing O'BRIEN, HAZARDS IN SAFETY 8 (1963). See also 51 VA. L. REV. 347, 352 (1965).

¹³⁸ *Kotarski v. Aetna Cas. and Sur. Co.*, *supra* note 130.

ties granted by the compensation act,"¹³⁹ and it might also be mentioned that they are favorite targets for juries and sizable judgments. Insurers will not be anxious to provide any kind of inspection service if it involves the risk of being liable for enormous damages,¹⁴⁰ and the probable result will be some insurers abandoning the inspection field and most insurers curtailing their safety service.¹⁴¹ Therefore, while in theory better safety inspections would cause the insurer's costs and the insured's premiums to decrease, the practical effect of holding the insurer liable is that fewer insurers will be willing to continue their inspection services with a resultant increase in costs, premiums, and accidents.¹⁴² As stated:

If an insurance company can escape tort liability altogether by not making any inspection . . . , but may incur unlimited tort liability by making some inspections, it more than likely will decline to make any, unless required to do so by statute. The ultimate losers will be workmen and their families.¹⁴³

CONCLUSION—A PREVIEW OF INSURER'S DEFENSES

At the present time, the majority of jurisdictions do not allow an employee to bring a tort action against his employer's workmen's compensation carrier for injuries proximately caused by a negligent, gratuitous safety inspection. Some of these jurisdictions outlaw the action by statute. The others judicially interpret their compensation act to find an implied intent barring it. Contrarily, a few courts recognize the employee's right to maintain the action, and insurers have failed to advance a successful defense to counter the reasoning followed in these states. However, in most of the cases where an injured employee has sued a workmen's compensation carrier for negligence in making a safety inspection, the employee has received part or all of his statutory compensation award.¹⁴⁴ Subsequently, the employee institutes his action against the insurer. This creates a situation which the insurers in those jurisdictions which have allowed the employee to maintain his action might possibly be able to take advantage of in the future. As previously mentioned, insurers have raised the defense that to allow the employee's action is to allow him a double-recovery under the various subrogation provisions of the workmen's compensation statutes. They argue that they are required to pay

¹³⁹ *Ibid.*

¹⁴⁰ The damages in *Nelson v. Union Wire Rope Corp.*, *supra* note 134, amounted to \$1,569,400.00 (*Id.* at 72, 199 N.E.2d at 772).

¹⁴¹ See 53 ILL. B.J. 349, 354 (1964).

¹⁴² See 14 SYRACUSE L. REV. 710, 712 (1963).

¹⁴³ *Id.* at 558-59.

¹⁴⁴ See, e.g., *Nelson v. Union Wire Rope Corp.*, *supra* note 134; *Smith v. American Employers' Ins. Co.*, *supra* note 125.

to the employee both the compensation award and the judgment rendered in his tort action, which permits the employee to recover twice in spite of their statutory right of subrogation. The argument continues that the subrogation provisions either give the insurer a lien on the judgment to the extent of the workmen's compensation paid, or it allows the insurer to proceed at law against the employee's tortfeasor, who, in this case, is the same insurer. The insurer's conclusion is that the maintenance of the employee's suit sanctions a double recovery, since one cannot have a lien against or sue himself. The basis for this defense is statutory and it is successful in accordance with the philosophy of statutory interpretation utilized by the court. But, as yet, an insurer has not attempted to couch its double-recovery defense in terms of common law principles and thereby avoid the statutory roadblocks. The carriers could accomplish this by relying on the common law principle that a plaintiff cannot recover more than once from the same defendant for a single injury caused by the defendant. This principle is generally brought out in cases involving the doctrines of splitting a cause of action,¹⁴⁵ multiplicity of suits,¹⁴⁶ and election of remedies,¹⁴⁷ although the doctrines would not be applicable to the situation of an employee suing a compensation carrier after taking his compensation claim. No election of remedies is involved here, since, before the employee is put to an election, his remedies must be inconsistent,¹⁴⁸ and his third party action is supplementary to rather than inconsistent with his claim for workmen's compensation.¹⁴⁹ Similarly, the employee cannot dispose of all of his claims in one action, since he can neither claim workmen's compensation in a court of law nor ask for tort damages in a hearing before a workman's compensation board, and this is an essential prerequisite to the applicability of the doctrines of multiplicity of suits¹⁵⁰ and splitting a cause of action.¹⁵¹ Moreover, cases demonstrating the common law double-recovery principle typically involved situations where the plaintiff is injured in his person and his property as a result of a single occurrence and institutes an action to recover for one after having commenced an action for recovery on the other.¹⁵² Thus, these cases can be distinguished from the workmen's compensation situ-

¹⁴⁵ *Daniel v. City of Tucson*, 52 Ariz. 142, 79 P.2d 516 (1938); *Pomeroy v. Prescott*, 106 Me. 401, 76 Atl. 898 (1910); *Sprague v. Adams*, 139 Wash. 510, 247 Pac. 960 (1926).

¹⁴⁶ *Georgia Ry. & Power Co. v. Endsley*, 167 Ga. 439, 145 S.E. 851 (1928); *Grue v. Hensley*, 357 Mo. 592, 210 S.W.2d 7 (1948); *Strapp v. Andrews*, 172 Tenn. 610, 113 S.W.2d 749 (1938).

¹⁴⁷ *Glezos v. Glezos*, 346 Ill. 96, 178 N.E. 379 (1931).

¹⁴⁸ *Ibid.* ¹⁴⁹ 26 NACCA L.J. 223, 225 (1960).

¹⁵⁰ *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 61 N.E.2d 707 (1945).

¹⁵¹ *Perry's Adm'r v. Louisville & N.R. Co.*, 199 Ky. 396, 251 S.W. 202 (1923).

¹⁵² See, e.g., *Georgia Ry. & Power Co. v. Endsley*, *supra* note 146; *Vasu v. Kohlers, Ind.*, *supra* note 150.

ation by their facts and by their application of the common law double-recovery principle.

However, in spite of the technical distinctions which can be drawn, it would seem that the fundamental basis for refusing to allow more than one proceeding on a single injury is the same in all instances. An employee becomes entitled to a workmen's compensation award when he suffers a job-connected injury. If the injury was caused by the tortious conduct of a third person other than one who has been granted immunity, the employee may maintain a tort action against such person, but in either case the single transaction or occurrence out of which the injury arose is the job-connected accident. When the third party tortfeasor is a person unrelated to and unconcerned with the employee's compensation award, there is no just reason for denying the third party action, since a plaintiff certainly can bring two separate actions against two separate defendants whenever each defendant has legally wronged the plaintiff, even though the harm to the plaintiff resulted from a single transaction. But after an insurer has paid the compensation award to the employee or has agreed to a settlement in regard to the claim, the employee's subsequent action, while proceeding on the theory of negligence rather than strict liability involved in a claim for workmen's compensation, is a second action based on the same transaction against the same defendant. The insurer, therefore, is subjected to multiple actions and liabilities, and the contention that the insurer is allowed a set off against the judgment in the tort action to the extent of compensation already paid would not seem to be material. The second action involves harassment and is vexatious and oppressive litigation, as a second attempt to again recover on an injury already compensated.

Insurers in those jurisdictions which have allowed a third party action by an employee against a carrier for negligent safety inspection cannot rely solely on the defenses they have raised in the past. Where the insurer has been held liable, the courts proceed on the theory, bolstered by their concept of public policy, that workmen's compensation statutes do not abrogate a common law right to maintain a tort action unless the statute so provides. While doubt has been expressed here as to the soundness of the rationale leading to that conclusion, it seems equally doubtful that defenses such as statutory immunity, based as they are on a contrary philosophy of statutory interpretation, will be more persuasive in the future than they have been until now. Insurers, if they are to prevail in these jurisdictions, must formulate a defense based on common law principles in order to side-step the pitfalls they have previously incurred. The prohibition against a double recovery, if used as a basis for arguing that the employee's action is barred not by statute but by common law, appears to be the most workable principle for providing such a defense.

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